



DATE: May 29, 1998  
CASE NO.: 96-INA-421

In the Matter of:

**TIMOTHY M. KOLMAN & ASSOCIATES,**  
Employer,

on behalf of

**ELENA DLOUGATCH,**  
Alien.

Appearances: Lawrence H. Rudnick, Esq.,  
for Employer and Alien

Before: Burke, Wood and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

***Per Curiam:*** This case arises from Timothy M. Kolman & Associates' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification on behalf of Elena Dlougatch ("Alien").<sup>1</sup>

This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

### **STATEMENT OF THE CASE**

On August 11, 1995, the Employer, Timothy Kolman & Associates, filed an application for labor certification to enable the Alien, Elena Dlougatch, to fill the position of "Paralegal." (AF 80). The requirements for the job included a Bachelor's Degree in a Liberal Arts field, as well as six months of experience in the job offered or six months of experience as an administrator. Other Special Requirements were that the applicant (1) hold a certificate of paralegal training; (2) be fluent in English and Russian; (3) have a demonstrated ability in written communication in both

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<sup>1</sup> The certification of aliens for permanent employment is governed by §212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20 Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited to in this decision are in Title 20.

English and Russian; and (4) have experience with simultaneous translation.

In a letter dated October 31, 1995, submitted to explain its rejection of five U.S. applicants, Employer stated, with regard to U.S. applicant Natalie Meerovich,<sup>2</sup> that while this applicant met the educational and language requirements for the position, she did not provide letters of references with respect to simultaneous translations or a writing sample. (AF 66). According to Employer, the applicant telephoned to state that she could not provide any information about her experience in translation, and explained that she did not have any writing samples because she had cleared out her files in her computer. Employer found this hard to believe, stating that "such an attitude" showed that this applicant did not want to make any effort to obtain the position. Employer added that a few days later, the applicant sent a letter, "simply referring [him] to different individuals requesting that I contact them in order to receive references." It was Employer's position that if the applicant wanted the job, she should have obtained the references. Therefore, the applicant "made herself unavailable for the job."

After being contacted by telephone by Employer, and in a letter dated the same day as her conversation, Meerovich wrote Employer to advise that she was following up on her conversation, and included names and telephone numbers of three attorneys who had used her services as a translator, as well as the names of two attorneys for whom she had worked as a paralegal. (AF 33). She reiterated that she did not have writing samples, having just cleaned up her computer files at home. She suggested, however, that her former employers would be able to attest to her writing abilities. Her resume indicated work as a paralegal from 1974 to 1995, with a total of three law firms.

In a Notice of Findings (NOF) dated April 22, 1996, the CO proposed to deny certification, finding that (1) the job requirements were unduly restrictive; (2) the Alien did not appear to meet the minimum requirements; and (3) one U.S. applicant, Natalie Meerovich, had been unlawfully rejected. Citing 20 C.F.R. §656.21(b)(2), the CO found that the requirement of six months of experience as an administrator was unduly restrictive because it is not normally required for the occupation, and is not related to the successful performance of the duties of the position. Employer was advised that rebuttal should include an explanation of how the requirement of six months experience as an administrator was directly related to the duties of the position, and documentation from three other legal firms of comparable size that they hire paralegals who do not have paralegal experience but do have six months of experience as an administrator.

The CO also questioned the minimum job requirements for the position, since the Alien did not meet the minimum requirements of a Bachelor's Degree in Liberal Arts, six months of experience in the job offered or six months as an administrator prior to hire. The CO noted that the Alien had six months of full-time experience in the job offered and had completed a one

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<sup>2</sup> As Meerovich was the only U.S. applicant whose rejection was questioned by the CO, the reasons for the rejection of the other U.S. applicants will not be detailed herein.

month, part-time externship with Employer. Because experience with an employer cannot be included in evaluating the alien's qualifications, Employer was advised to (1) submit evidence which clearly showed that the Alien had the six months full-time experience in the job offered with an employer other than Employer; or (2) submit evidence that it is not presently feasible, due to business necessity, to hire a worker with less than the qualifications presently required for the job opportunity.

The CO did not accept Employer's explanation regarding its rejection of U.S. applicant Meerovich. The CO pointed out that this applicant had twenty-one years of experience as a paralegal, and that she had gained her experience with local firms, all of which were listed in the telephone book. If Employer had found that the applicant's former employers were unwilling to release documents which would demonstrate the applicant's writing ability, it could have asked the applicant to compose an appropriate document during an interview. Employer was advised that it had the burden of providing lawful, job-related reasons for the rejection of this U.S. worker.

Employer submitted rebuttal, consisting of two letters from Employer, dated May 2, 1996 and May 14, 1996, as well as a letter from Employer's counsel dated April 29, 1996. (AF 20, 25, 27). Citing Best Luggage, Inc., 88-INA-553 (Nov. 1, 1989),<sup>3</sup> counsel for Employer contended that the requirement of experience as an administrator was an alternative requirement, and as long as same was appropriate and related to the job, it was not unduly restrictive. Employer argued that the position of paralegal was such that an administrative assistant would have direct transferrable skills to the important components of the position of a paralegal, and therefore, the requirement was not unduly restrictive. Employer also attached documentation regarding the Alien's position in Moscow, as verification of her employment as a Senior Administrator.

With regard to the U.S. applicant, Employer, citing Sunee Kim's Enterprises, 87-INA-713, (July 22, 1988), argued that an employer may request verification of employment history and educational credentials and may reject an applicant based on her failure to provide such verification. Employer contended that it has no obligation to obtain a writing sample for an applicant who is unwilling or unable to provide the sample, and that employers do not provide time at an interview for the preparation of a writing sample, as suggested by the CO. Employer reiterated that the applicant made herself unavailable for the position.

In Employer's letter of May 14, 1996, it was argued that the applicant could easily have prepared another writing sample, if she had none in her computer, and that since the law firms for which she had worked still existed and were in the telephone book, she could have easily requested letters of reference. Instead, "she preferred a very strange course of action such as referring him to her previous employers." Employer stated that he understood that he must contact applicants and request additional information from them; however he is not obligated to

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<sup>3</sup> Although subsequent to filing this appeal, Best Luggage, Inc., was overruled by a decision of the full Board in Francis Kellogg, et al., 94-INA-465, 544 and 95-INA-068 (Feb. 2, 1998) (*en banc*), this Decision is not based on the issues addressed in Best Luggage or Kellogg.

contact their previous employers to obtain additional information. It was also his position that even if he had done so, he sincerely believed that none of the lawyers would have released any of her writings given the confidential nature of the files. Given the applicant's failure to provide a writing sample and letters of reference, it was Employer's position that the applicant made herself unavailable.

The CO issued a Final Determination dated May 24, 1996. (AF 15). Therein, he denied certification, rejecting Employer's arguments on all issues raised in the NOF. The CO found that Employer had failed to establish that an applicant with no experience as a paralegal, but with six months of experience as an administrator, would be able to perform the duties listed in the ETA Form 750A. The CO pointed out that Employer had relied on the DOT description of the position of an administrative assistant, while the ETA 750 listed the alternate experience as an administrator, not an administrative assistant. Employer also failed to provide the requested statements from three other law firms, attesting that they hire paralegals who have experience as an administrator, but not as a paralegal.

Employer's rebuttal regarding whether the Alien met the minimum requirements for the position, consisting in part of a printout from an unidentified source showing that the Alien's position in Moscow as a Senior Administrator, was not accepted. Finally, the CO rejected Employer's rebuttal regarding its rejection of Meerovich. The CO questioned whether the applicant was informed that she could prepare a writing sample as an alternative to having one already prepared, further finding that the applicant did respond to Employer's request for additional information by suggesting that Employer contact her five references as provided in her letter.

Employer filed a motion for reconsideration and request for review on June 28, 1996. (AF 3). The CO denied the request for reconsideration on July 3, 1996, finding that it contained no issues which could not have been addressed in the rebuttal. Harry Tancredi, 88-INA-441 (December 1, 1988) (*en banc*). By letter dated July 11, 1996, Employer requested that this matter be forwarded for review. (AF 1).

### **DISCUSSION**

20 C.F.R. §656.21(b)(6) provides that if U.S. workers have applied for the job opportunity the employer must document that they were rejected solely for lawful job related reasons. Where a U.S. applicant's resume reveals that he or she clearly lacks the minimum specified job requirements, that applicant may be rejected without an interview. ENY Textiles, Inc., 87-INA-641 (Jan. 22, 1988). However, where an applicant's resume indicates a broad range of experience, education and training such that it is reasonably possible that she is qualified for the job, an Employer has an obligation to further investigate that applicant's credentials. Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990)(*en banc*).

In the instant case, Employer has conceded that the U.S. applicant Meerovich met the educational and experience requirements of the position. It is Employer's contention, however,

that because Meerovich did not produce the writing sample and letters of reference, this applicant made herself unavailable for the position.<sup>4</sup> While such a contention may be accurate had the applicant refused to provide any information regarding her past experience, or the names and telephone numbers of her past employers, this is not the situation here. The applicant was spoken to by telephone, and responded by letter on the same date, indicating that while she did not have the letters of reference or writing sample, same could be obtained by Employer merely by contacting the references she provided in her letter.

It is obvious that an effort was made by this applicant to provide what the Employer required. Employer had an obligation to pursue this applicant and failed to do so. The situation is obviously different from that in the cases of Al-Ghazi School, 88-INA-347 (March 31, 1989), and Sunee Kim's Enterprises, 87-INA-713 (July 22, 1988), wherein it was held that employers may request verification of employment history and educational credentials, and may reject an applicant based on the failure to provide such information. Here the basic information was provided, and the applicant was never interviewed although apparently qualified. Employer's explanation was that it was his understanding that he had to contact applicants and request additional information from them regarding their experience and educational background. He was not, however, "obligated to contact their previous employers in terms of getting such information."

Employer's arguments miss the point. Meerovich was, by all appearances, a willing and able U.S. worker. She provided her educational and work background, as well as references, indicating that two of these references would provide a writing sample. She also stressed her interest in meeting Employer. To call her unavailable is contrary to the facts. It does not appear from Meerovich's letter to Employer that the option of creating a writing sample was suggested by Employer, as Meerovich states she does not have a writing sample, not that she is unwilling to write one.

As this U.S. applicant had a resume which showed that she met and indeed, exceeded Employer's requirements, it was Employer's burden to further investigate this applicant. Gorchev & Gorchev Design, *supra*. While an employer may reject a U.S. applicant if the employer documents that the applicant is unavailable, Lebanese Arak Corp., 87-INA-683 (April 24, 1989), Employer herein has failed to document that the U.S. applicant was unavailable. Indeed, the applicant responded to a telephone call by writing a letter on the same day, in which she indicated

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<sup>4</sup> Given Employer's claim that it can summarily find Meerovich unavailable because she did not produce requested documentation, it is ironic to note that in the NOF, Employer was requested to provide documentation from three law firms of comparable size, affirming that they have hired paralegals with no experience as such, but six months of experience as an administrator. (AF 30). Employer ignored the request, and unlike Meerovich, failed to provide a follow-up letter explaining the deficiency. An employer's failure to produce relevant and reasonably obtainable documentation requested by the CO is ground for the denial of labor certification. STLO Corporation, 90-INA-7 (Sept. 9, 1991). This is especially the case where, as here, the employer does not justify the failure. Vernon Taylor, 89-INA-258 (Mar. 12, 1991).

her continued interest in the position, also listing five references for Employer to contact. It was incumbent upon Employer to interview this applicant.

As Employer has failed to establish that the U.S. applicant at issue was rejected for lawful, job-related reasons, labor certification was properly denied. Therefore, the remaining issues need not be addressed.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

**SO ORDERED.**

Entered at the direction of the panel:

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Todd R. Smyth, Secretary to the Board  
of Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400 North  
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.